

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Order Instituting Rulemaking to Consider the Adoption of
a General Order and Procedures to Implement the Digital
Infrastructure and Video Competition Act of 2006.

R.06-10-005
(Filed October 5, 2006)

**RESPONSE OF AT&T CALIFORNIA
TO APPLICATIONS FOR REHEARING**

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Pacific Bell Telephone Company d/b/a AT&T California (hereinafter, “AT&T California” or “AT&T”), pursuant to Commission Rule of Practice and Procedure 16.1(d), provides this response to the following applications for rehearing of Decision 07-03-014 (“Decision”): **Application of The Utility Reform Network for Rehearing of Decision 07-03-014 (“TURN Application”)**, dated April 4, 2007; and **Application for Rehearing of Decision 07-03-014 of the Greenling Institute (“Greenlining Application”)**, dated April 4, 2007. For the reasons set forth below, AT&T California requests these applications be denied.

I. INTRODUCTION

The first and primary finding of the Digital Infrastructure And Video Competition Act of 2006 (“DIVCA” or “the Act”) is that “[i]ncreasing competition for video and broadband services is a matter of statewide concern,”¹ because *increasing competition* will: (1) provide consumers with more choice, (2) lower prices, (3) speed the deployment of new communication and broadband technologies, (4) create jobs, (5) benefit the California economy, and (6) increase opportunities for programming that appeals to California’s diverse population and many cultural communities.²

The Act is explicit in adopting “competition,” rather than regulation, to achieve the benefits envisioned by the Legislature. TURN and Greenlining urge the Commission to reject the fundamental approach of the Act and to subject video service providers to “historical” public utility regulation.³ TURN argues the Commission must apply “long-standing Commission

¹ Pub. Util. Code § 5810(a)(1) (emphasis added).

² Pub. Util. Code § 5810(a)(1)(B); Pub. Util. Code § 5810(a)(1)(D).

³ TURN Application, p. 11 (“California laws as well as Commission rules have historically encouraged intervenor participation in Commission proceedings.”); *see also* Greenlining Application, p. 4 (“Greenlining believes D.07-03-014 has not only *departed* from the implicit and explicit intentions of the Legislature, but *from Commission rules and precedent.*”) (emphasis added).

practice” to video service providers,⁴ and complains that the Decision “turns years of Commission practice on its head.”⁵ But that is exactly what DIVCA requires. DIVCA went to great lengths to make clear that “video service providers *are not public utilities* or common carriers,”⁶ and that “[t]he holder of a state [video] franchise *shall not be deemed a public utility* as a result of providing video service....”⁷ Thus, DIVCA *requires* that video services be free from “historical” public utility regulation.

DIVCA also repeatedly emphasizes that, in sharp contrast to the Commission’s jurisdiction over public utilities, the Commission has limited authority over video services and video service providers,

[DIVCA] shall not be construed as granting authority to the commission to regulate the rates, terms, and conditions of video services, except as explicitly set forth in [DIVCA].⁸

Neither the commission nor any local franchising entity or other local entity of the state may require the holder of a state franchise to obtain a separate franchise *or otherwise impose any requirement* on any holder of a state franchise *except as expressly provided* in [DIVCA].⁹

Through these and other provisions, DIVCA makes plain that its main and overriding goal is to bring benefits to California and Californians *through competition*, not traditional public utility regulation. The applications for rehearing of TURN and Greenlining ignore not only DIVCA’s fundamental approach, but also its specific provisions.

⁴ TURN Application, p. 17.

⁵ *Id.*

⁶ Pub. Util. Code § 5810(a)(3) (emphasis added).

⁷ Pub. Util. Code § 5820(c) (emphasis added).

⁸ *Id.*

⁹ Pub. Util. Code § 5840(a) (emphasis added).

II. DISCUSSION

As discussed below, neither the TURN Application nor the Greenlining Application identifies any errors in the Decision.

A. The Decision Appropriately Addresses Section 5940

In its Application, TURN repeats its previous assertions that DIVCA generally prohibits “cross-subsidization”¹⁰ and that the Commission must “collect[] highly detailed and disaggregated data and closely examin[e] it”¹¹ in order to enforce this alleged prohibition. TURN claims the Decision errs by not imposing extensive regulations for the collection and examination of such data. TURN’s claims are inaccurate.

First, DIVCA does *not* include a general prohibition of “cross-subsidization.” Indeed, the term “cross-subsidization” does not even appear in DIVCA. Section 5940 of DIVCA imposes a much narrower prohibition:

The holder of a state franchise under [DIVCA] who also provides stand-alone, residential, primary line, basic telephone service *shall not increase this rate to finance the cost of deploying a network to provide video service.*¹²

Section 5940’s prohibition is triggered only where there is (a) an increase to a specific, basic rate; *and* (b) that increase is used to finance deployment of a video network. TURN’s claim that DIVCA generally prohibits “cross-subsidization” is incorrect.

Second, TURN’s attempt to use section 5940 to justify the imposition of extensive

¹⁰ TURN Application, pp. 4-5; *see also* TURN Comments on PD, p. 4.

¹¹ TURN Application, p. 10; *see also* TURN Comments on PD, p. 4.

¹² Pub. Util. Code § 5940 (emphasis added). TURN also implies that Pub. Util. Code section 5950 prohibits cross-subsidization (TURN Application, pp. 4-5), but section 5950 simply freezes certain rates. Thus, while it may act to preclude certain potential cross-subsidization, section 5950 is not, *per se*, a prohibition on cross-subsidization.

regulations requiring the collection and examination of “highly detailed and disaggregated data”¹³ is contrary to the express provisions of DIVCA and unnecessary. As indicated above, the Commission may not “impose any requirement on any holder of a state franchise except as expressly provided in [DIVCA].”¹⁴ TURN’s proposed “cross-subsidization” regulations go far beyond the reporting requirements authorized by DIVCA¹⁵ and thus are contrary to the Act.

As the Decision properly notes,¹⁶ moreover, section 5950 of DIVCA effectively ensures compliance with section 5940 at least until January 1, 2009 because section 5950 prohibits any increase in basic rates prior to that date. AT&T cannot increase basic rates “to finance” a video network build-out because it cannot increase those rates at all. Further, as the Decision also notes,¹⁷ the Commission already has more than sufficient tools to ensure any basic rate increases after January 1, 2009 are not used to finance the cost of deploying a video network. If and when a telecommunications carrier proposes to increase a “stand-alone, residential, primary line, basic telephone service” rate covered by section 5940, the Commission has ample authority over telecommunications carriers to ensure that the proceeds are not used impermissibly to “finance the cost of deploying a network to provide video service.” The extensive regulations proposed by TURN are unnecessary.

¹³ TURN Application, p. 10; *see also* TURN Comments on PD, p. 4.

¹⁴ Pub. Util. Code § 5840(a).

¹⁵ Pub. Util. Code §§ 5920, 5960.

¹⁶ Decision, *mimeo*, p. 189.

¹⁷ *Id.* at 189-191.

B. The Decision Properly Disallows Protests Of Franchise Applications.

TURN¹⁸ and Greenlining¹⁹ argue that the Decision errs by not allowing protests of video franchise applications. To the contrary, allowing protests would violate DIVCA.

DIVCA's focus on competition as the driver of positive change is reflected in the circumscribed and timely application process it mandates. DIVCA sets forth precise application requirements and a detailed application process, and orders the Commission to require no more:

The application process described in this section [5840] and the authority granted to the commission under this section *shall not exceed the provisions set forth in this section.*²⁰

Section 5840 establishes nine specific items to be included in the application,²¹ and then directs that "[i]f the commission finds the application is complete, it *shall* issue a state franchise...."²² Further emphasizing its objective of quickly allowing new competitors into the video services market, DIVCA even provides that a franchise is deemed awarded if the Commission does not act within 44 calendar days.²³ Section 5840 sets forth the entirety of the permissible steps in the application process and it does not include protests. Therefore, protests are not allowed.

Moreover, California law recognizes that ministerial acts, such as the issuance of state video franchises under AB 2987, are not subject to protest.

Where a statute requires an officer to do a prescribed act upon a prescribed contingency, his functions are ministerial. Where a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take,

¹⁸ TURN Application, pp. 11-17.

¹⁹ Greenlining Application, pp. 3-5.

²⁰ Pub. Util. Code § 5840(b) (emphasis added).

²¹ Pub. Util. Code § 5840(e).

²² Pub. Util. Code § 5840(h)(2) (emphasis added).

²³ Pub. Util. Code § 5840(h)(4).

that course of conduct becomes mandatory and eliminates any element of discretion.²⁴

The issuance of a state video franchise under DIVCA is a ministerial, or mandatory, duty. Again, DIVCA provides that, “[i]f the commission finds the application is complete, it *shall* issue a state franchise before the 14th calendar day after that finding.”²⁵ California courts have confirmed that, in legislation, “[t]he word ‘shall’ indicates a mandatory or ministerial duty.”²⁶ Thus, DIVCA clearly defines the course of conduct the Commission must take, and the Commission is under a mandatory duty to issue a franchise when an applicant submits a complete application. California courts have held that protesting a mandatory duty “would be an idle act and could accomplish nothing.”²⁷ Thus, California law does not allow protests of video service applications.

TURN would have the Commission ignore DIVCA’s clear directive, and instead import “historical” public utility regulatory procedures into video service proceedings, including protests.²⁸ DIVCA does not allow video proceedings to be treated the same as “historical” Commission proceedings. The Commission’s authority to allow protests in public utility proceedings stems from its general authority to regulate public utilities. DIVCA makes clear that the Commission’s video service authority is not “business as usual” by mandating in two separate provisions that video service providers are not to be treated as public utilities.²⁹ DIVCA

²⁴ *Rodriguez v. Solis* (1991), 1 Cal.App.4th 495, 504-505 (citing *Great Western Sav. & Loan Assn. v. City of Los Angeles* (1973), 31 Cal.App.3d 403, 413).

²⁵ Pub. Util. Code § 5840(h)(2) (emphasis added).

²⁶ *Lazan v. County of Riverside* (2006), 140 Cal.App.4th 453, 460.

²⁷ *Irvine v. Citrus Pest Dist.* (1944), 62 Cal.App.2d 378, 383.

²⁸ TURN Application, p. 11 (“California laws as well as Commission rules *have historically encouraged intervenor participation* in Commission proceedings.”) (emphasis added).

²⁹ Pub. Util. Code § 5820(c) (“The holder of a state franchise shall not be deemed a public utility as a result of providing video service under this division. This division shall not be construed as granting authority to the commission to regulate the rates, terms, and conditions of video services, except as explicitly set forth in this

could not have been clearer that historical public utility processes and regulations cannot be applied to video service providers.

Greenlining argues DIVCA's timetable does not constrain protests,³⁰ and TURN claims a protest could be made, responded to, considered and acted upon by the Commission within the 30 days allowed for determining application completeness.³¹ These claims are entirely unrealistic. Commission rules for public utilities allow protests of applications to be filed within 30 days from the date an application is noticed in the Daily Calendar,³² and then allow 10 days for replies.³³ Thus, existing rules establish a 40+ day process—not even allowing time for Commission deliberation or action. But DIVCA requires the Commission to notify an applicant whether its application is complete within 30 days.³⁴ Obviously, DIVCA does not envision protests, and the Commission does not need protests to determine whether the application is complete.

TURN further claims that because the application must include a description of the proposed video service area and the applicants' qualifications, the Commission must ensure that the applicant "has a reasonable plan to meet the statutory objectives including the anti-discrimination requirements."³⁵ In other words, TURN claims the Commission must review and approve an applicant's business plan. This claim directly contradicts DIVCA's fundamental

division."); Pub. Util. Code § 5810(a)(3) ("video service providers are not public utilities or common carriers").

³⁰ Greenlining Application, p. 4.

³¹ TURN Application, pp. 15-17.

³² Rule 2.6(a).

³³ Rule 2.6(e).

³⁴ Pub. Util. Code § 5840(h)(1).

³⁵ TURN Application, pp. 13-14.

approach of achieving benefits through competition, not regulation. It also contradicts DIVCA's specific requirement that the Commission must issue a franchise if the application is "complete."³⁶ No analysis of business plans is required, or allowed. Indeed, TURN's proposal to review each applicant's business plan starkly demonstrates that protests would thwart the Act's fundamental objective of increasing video competition.

C. The Decision Properly Disallows Intervenor Compensation For DIVCA Proceedings.

Greenlining³⁷ and TURN³⁸ claim the Decision errs because it does not allow intervenor compensation in DIVCA proceedings. These claims are incorrect. California law does not allow intervenor compensation in DIVCA proceedings.

As explained above, DIVCA took pains to make clear that "*video service providers are not public utilities*,"³⁹ and that the Commission has no more authority over video service providers than that expressly granted in DIVCA.⁴⁰ DIVCA specifically outlines the role to be played by the Division of Ratepayer Advocates ("DRA"),⁴¹ while conspicuously omitting any role for intervenors.

The Legislature has also made clear that intervenor compensation is only available for participation in proceedings involving public utilities. In creating the intervenor compensation

³⁶ Pub. Util. Code § 5840(h)(2).

³⁷ Greenlining Application, pp. 5-6.

³⁸ TURN Application, pp. 17-23.

³⁹ Pub. Util. Code § 5810(a)(3) (emphasis added).

⁴⁰ See, e.g., Pub. Util. Code § 5840(a) ("Neither the commission nor any local franchising entity or other local entity of the state may require the holder of a state franchise to obtain a separate franchise *or otherwise impose any requirement* on any holder of a state franchise except as expressly provided in this division." (emphasis added)); Pub. Util. Code § 5840(b) ("The application process described in this section and *the authority granted to the commission under this section shall not exceed the provisions set forth in this section*." (emphasis added)). Oddly, TURN completely ignores these restrictions in arguing that "[t]here is nothing prohibiting" the Commission from requiring all video franchisees to pay into an intervenor compensation fund. TURN Application, p. 22.

program, the Legislature declared its intent that “[t]he provisions of this [intervenor compensation] article shall apply to all formal proceedings of the commission *involving* electric, gas, water, and telephone *utilities*.”⁴² The Legislature confirmed this focus on public utilities in explaining that the purpose of the program is to “encourage[] the effective and efficient participation of all groups that have a stake in the *public utility* regulation process.”⁴³ Thus, the intervenor compensation statutes provide that “[a]ny award made under this [intervenor compensation] article shall be paid by *the public utility* which is the subject of the hearing, investigation, or proceeding...,” and “any award paid by *a public utility* pursuant to this article shall be allowed by the commission as an expense for the purpose of establishing rates of *the public utility*...”⁴⁴

In addition, the Legislature limited the class of persons who could recover intervenor compensation to those representing the interests of *public utility* customers. Compensation is only available to “*public utility customers*.”⁴⁵ The “customer”⁴⁶ eligible for compensation is specifically defined as,

A participant representing consumers, customers, or subscribers of *any electrical, gas, telephone, telegraph, or water corporation* that is subject to the jurisdiction of the commission.⁴⁷

⁴¹ Pub. Util. Code § 5900(k).

⁴² Pub. Util. Code § 1801.3(a) (emphasis added).

⁴³ Pub. Util. Code § 1801.3(b) (emphasis added).

⁴⁴ Pub. Util. Code § 1807 (emphasis added). Further, the Commission has no authority to establish video service rates (*see, e.g.,* Pub. Util. Code § 5820(c)), thus this provision could not be applied to video service providers.

⁴⁵ Pub. Util. Code § 1801 (emphasis added); *see also* Pub. Util. Code § 1802.5 (“Participation by a customer...” (emphasis added)).

⁴⁶ Pub. Util. Code § 1803.

⁴⁷ Pub. Util. Code § 1802(b)(1)(A).

Thus, intervenor compensation is not available to represent the interests of video service customers.

The Commission, moreover, has no inherent authority to grant intervenor compensation in this context. The Commission's unquestionably broad, general grants of authority in the Constitution (Article XII) and the Public Utilities Code (*e.g.* § 701) are premised on its regulation of public utilities ("may supervise and regulate *every public utility* in the State" and "which are necessary and convenient in the exercise of such power and jurisdiction."⁴⁸ Again, DIVCA is explicit that "video service providers are not public utilities or common carriers."⁴⁹ It has long been the statutory and case law in California that, attorney fees are left to the parties "[e]xcept as attorney's fees are specifically provided for by statute...."⁵⁰ The law is clear that the Commission does not have the authority to grant intervenor compensation in DIVCA proceedings.

⁴⁸ *Id.* (emphasis added)

⁴⁹ Pub. Util. Code § 5810(a)(3); § 5820(c).

⁵⁰ Code Civ. Proc. § 1021.

III. CONCLUSION

For the reasons set forth above, AT&T California requests the applications for rehearing filed by TURN and Greenlining be denied.

Respectfully submitted,

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DATED: April 19, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the **RESPONSE OF AT&T CALIFORNIA TO APPLICATIONS FOR REHEARING in R.06-10-005** by electronic mail, hand-delivery and/or by mailing a properly addressed copy by first-class mail with postage prepaid to each party named in the official service list.

Executed this 19th day of April 2007, at San Francisco, California.

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